1986

The State of Utah v. Julie Warren Verde : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent, vs. JULIE WARREN VERDE, Defendant-Appellant.	)	Case No. 20954 (Priority 2)

BRIEF OF APPELLANT

Appeal from the judgment and conviction before the Honorable Homer F. Wilkinson, Third District Court Judge, in and for Salt Lake County, State of Utah.

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Was there insufficient evidence to support a verdict finding that defendant had committed a violation of §76-7-203, Utah Code Annotated (1953, as amended 1973), sale of a child, where defendant never told the prosecutrix that she would not place a child with her if the prosecutrix did not pay some of defendant's personal medical expenses, where the only sums of money discussed between defendant and the prosecutrix dealt with possible legal fees and medical expenses and defendant never demanded payment of money or other thing of value as consideration for placing a child with the prosecutrix?

2. Did the trial court commit reversible error when it failed to instruct the jury as to all of the elements, including the exceptions, of the crime of sale of a child?

3. Was defendant denied effective assistance of counsel under the facts and circumstances of this case?

4. Did the trial court abuse its discretion by allowing, over defense objection, a prosecution witness to testify as to the prosecutrix's emotional state and suicide attempt after February 1, 1985?

STATEMENT OF FACTS

Defendant, a 26-year old married woman with a three-year old daughter, was convicted on September 5, 1985, of violation of §76-7-203, U.C.A. (1953, as amended 1973), sale of a baby, a third degree felony. (See Addendum 1.) The violation allegedly occurred February 1, 1985. A jury trial was held June 5-6, 1985, with the Honorable Homer F. Wilkinson, Judge, presiding. An eight-person jury found defendant guilty as charged. (R. 63) Judge Wilkinson ordered defendant committed to the Utah State Hospital for a 30-day presentence evaluation. (R. 72; see Addendum 2.)

Defendant was sentenced to the indeterminate sentence of up to five years in prison provided by law and placed on probation on condition she serve nine months in county jail (reduced by 90 days if defendant performed community service) and pay a fine of $2,500.00. Her sentence was modified on November 18, 1985, by reducing the jail term to three months. (See Addendum 3.)

Defendant's sentence has been stayed pending this appeal since January 20, 1986, the date the Utah Supreme Court granted defendant's application for certificate of probable cause. She is released under a bond set by Judge Wilkinson.

The facts and circumstances which led to defendant's arrest and subsequent conviction follow.

Defendant, Julie Warren Verde, first met the prosecutrix, Tammy Watson, when defendant consulted Dr. Ray Barton regarding treatment for weight reduction in June 1984. (Tr. 10) Mrs. Watson, a medical assistant in Dr. Barton's office (Tr. 9), was pregnant. (Tr. 12) She subsequently suffered a miscarriage in September, 1984. (Tr. 12)

Defendant visited Dr. Barton's office on a weekly or bi-weekly basis to receive injections of vitamin B-1 and other medications. The injections cost $6.00 or $8.50 each, depending on the type received. (Tr. 15-16) Shortly after Mrs. Watson's miscarriage, the defendant made a regular visit to Dr. Barton's office. (Tr. 12-13) When defendant learned of Mrs. Watson's miscarriage, defendant asked her if she and her husband would be interested in privately adopting a child. (Tr. 13) Defendant, through her church, had been getting information from a pro-life group in another state about adoption as an alternative to abortion. (Tr. 214)

Defendant told the prosecutrix that she knew of a pregnant woman who was due to deliver in December, 1984, and who was considering placing the child for adoption. (Tr. 13-14, 220) Mrs. Watson and her husband told the defendant they were interested in adopting. (Tr. 14)

The defendant and Mrs. Watson discussed attorney fees and hospital expenses to consummate the adoption. (Tr. 14-15,

220-221, 223) According to Mrs. Watson, the defendant initially quoted approximate medical expenses of $2,000.00 to $5,000.00 and legal fees of $500.00. (Tr. 15) Defendant denied quoting any specific amount for medical expenses (Tr. 248), although she agreed she had quoted legal fees of $500.00. (Tr. 223) No funds ever exchanged hands specifically for the purchase of a child, nor for any other expenses having to do with an adoption procedure. (Tr. 102) Defendant never did ask prosecutrix to pay her money for any adoption services. (Tr. 104) Defendant and the prosecutrix never discussed how much money defendant would get out of the transaction, if any. (Tr. 71)

In the months of October, 1984, through January, 1985, Mrs. Watson paid for defendant's vitamin B-1 injections. (Tr. 98) Defendant testified that there was no agreement that Mrs. Watson would pay for the shots because defendant was helping her with the adoption (Tr. 240), while Mrs. Watson testified that because defendant would give her a reduction on the attorney fees for the adoption, Mrs. Watson agreed to pay for defendant's vitamin B-1 injections. (Tr. 15) Defendant denied that she had told the prosecutrix the attorney's fees would be discounted. (Tr. 244) Defendant did not know Mrs. Watson was paying for her injections (Tr. 269), since Mrs. Watson told her "they were on the house." (Tr. 269) In any event, the shots Mrs. Watson paid for totalled approximately $80-90. (Tr. 62)

From October through January, defendant and the prosecutrix were in regular contact, in person and by phone, concern-

ing the possibility of adopting a child. (Tr. 18-19, 246) While attorney's fees and hospital expenses were discussed, defendant never told the prosecutrix that defendant would charge a fee as well. (Tr. 104) Mrs. Watson and her mother, Dorothy Jackson, were permitted to testify at length, without objection, about their various purchases of clothing, a crib, a car seat and other items purchased in anticipation of the adoption. (Tr. 21-27, 29-38, 63, 134-136) Photographs of some of these items were admitted into evidence over defense counsel objection. (Tr. 202-203, 206)

Defendant testified that the woman who was considering placing her child changed her mind. (Tr. 223) Rather than disappoint the Watsons by telling them of this turn of events, defendant attempted to find another woman willing to give her child up for adoption. (Tr. 208-209, 223-224)

In early January, 1985, defendant's best friend, June Burkhardt, and her three young daughters (Tr. 184-185) all became ill with strep and viral infections. (Tr. 189, 194-195) Since Mrs. Burkhardt was too ill to care for her children, the defendant, who was also sick (Tr. 227), arranged to place the children with friends until Mrs. Burkhardt recovered sufficiently to resume caring for them. (Tr. 198)

Defendant testified that she called Mrs. Watson, explained the situation and asked her to temporarily care for Emlee, Mrs. Burkhardt's 13-month old daughter, until Mrs. Burkhardt's condition improved. (Tr. 227) Mrs. Watson testified

that the defendant told her she could have Emlee for a "trial period." (Tr. 48) The defendant brought Emlee to Mrs. Watson on the evening of January 4, 1985, (Tr. 47-48) and took her back on the 6th (Tr. 51), and returned her to the Watsons on the 7th. (Tr. 53) Mrs. Watson testified that defendant took Emlee back again on the 13th of January (Tr. 54), while defendant and Mrs. Burkhardt testifed that Emlee was returned to Mrs. Burkhardt on January 11. (Tr. 199, 256-257)

Defendant testified that she took Emlee back to Mrs. Watson on the 7th because Mrs. Burkhardt was still unable to care for the children herself. (Tr. 230) Mrs. Burkhardt testified that once she had the children back on the 6th, she realized she still could not care for them and asked defendant to take the children again and send them to friends' homes for care. (Tr. 198) Mrs. Burkhardt knew that defendant was not caring for her daughters personally. (Tr. 196-197) Defendant admitted that she told Mrs. Watson, sometime after Mrs. Watsor agreed to take Emlee the second time, that Emlee was available for adoption. (Tr. 230-231) Mrs. Watson never asked defendant why she was getting a 13-month old child instead of a newborn. (Tr. 86)

On the 7th, defendant and Mrs. Watson met in a Fred Meyer parking lot at which time defendant gave Emlee to the prosecutrix. (Tr. 53) Defendant asked the prosecutrix for gas money and the prosecutrix gave her $5.00. (Tr. 53-54)

Mrs. Watson was permitted to testify at length, without objection, regarding her purchases of clothes, medicine and toys for Emlee. (Tr. 55) She was also permitted to show the jury a photograph of her husband and Emlee, without objection. (Tr. 64)

Sometime after defendant took Emlee back the second time (January 11 or 13, 1985), the prosecutrix contacted the police. (Tr. 56) Thereafter, at police request, Mrs. Watson called defendant and asked when she could see Emlee again. (Tr. 94) They arranged to meet at 9 a.m. on February 1, again at Fred Meyer. (Tr. 59)

On February 1, defendant asked Mrs. Burkhardt if she could have Emlee for the day, although she did not tell her she was taking Emlee to see the prosecutrix. (Tr. 185-186, 265) The defendant testified she told the prosecutrix that she could have Emlee on a visitation basis and that she told the prosecutrix to bring Emlee back at 5 p.m. that day. (Tr. 238) Mrs. Watson stated that when defendant put Emlee in the car, she said the baby was hers now. (Tr. 60) No discussion of money or arrangement for payment took place at that time. (Tr. 61)

Two Salt Lake City Police investigators were keeping watch. (Tr. 60) As defendant left the parking lot, she was stopped by the two detectives for questioning. (Tr. 150) She was subsequently charged by information with violation of §76-7-203. At trial, Mrs. Watson testified that when she knew she was not going to be able to adopt a baby, she attempted to

commit suicide. The prosecution withdrew the question when objection was made. (Tr. 62-63) However, Mrs. Watson's employer, Dr. Barton, was allowed to testify as to this incident and the prosecutrix's emotional state over defense counsel's objection. (Tr. 165) A friend of the prosecutrix, Tania Leonard, was permitted to testify about the prosecutrix's emotional state, this time without objection. (Tr. 125-126)

Mr. Alan D. Frandsen, defendant's trial attorney, did not prepare jury instructions on defendant's theory of the case; and as a direct consequence, the jury was not instructed that payment of legal and medical fees is not an offense under the statute. (R. 31-39, 40-62) At trial, Mr. Frandsen, without objection, allowed the prosecutor to conduct irrelevant lines of questioning regarding the prosecutrix's purchases in anticipation of adoption (Tr. 21-27, 30-32, 55, 134-136) and failed to object to the admission into evidence of such purchases (Tr. 203); allowed a witness to testify to the prosecutrix's emotional state after defendant was arrested (Tr. 125-127); and allowed witnesses to testify as to inadmissible hearsay (Tr. 110, 120-121, 123-124, 126-127, 182).

Subsequent to her conviction, defendant discharged her trial attorney and retained Robert Van Sciver to represent her on this appeal.

SUMMARY OF ARGUMENT

1. Section 76-7-203 declares it illegal for any person to sell, or attempt to sell, a child "for and in consideration

of the payment of money or other thing of value. . . ." The statute specifically excepts payment of medical expenses, while another Utah statute permits payment of legal fees for services rendered in connection with an adoption procedure (§55-8a-1(4)). The jury was never informed of these exceptions. The evidence at trial showed that the sums discussed between the prosecutrix and the defendant always concerned medical and legal expenses. Defendant never demanded the money personally for her assistance in the placement process, nor did any funds exchange hands either for the sale of a child or any other adoption related expenses. The evidence is insufficient to support the jury's verdict of guilt of violation of §76-7-203.

2. The trial judge had an affirmative duty to instruct the jury as to the exceptions to the offense of sale of a child, despite defense counsel's failure to offer such an instruction or to object to the lack of such an instruction. The jury was not instructed that payment of medical expenses or legal fees are permissible expenditures and do not constitute a violation of §76-7-203. The conviction should therefore be reversed in order to prevent manifest injustice.

3. Defense counsel at trial committed several errors in his representation of defendant, including failure to ensure that the jury was instructed regarding the exceptions to the offense charged, failure to object to (1) the introduction of irrelevant testimony concerning the purchases of baby items, (2) irrelevant testimony concerning the prosecutrix's emotional

state once she knew she would not be adopting a child with defendant's assistance and (3) statements of inadmissible hearsay. Such errors denied defendant her right to effective assistance of counsel, as guaranteed by the United States and Utah Constitutions.

4. The trial court erred in permitting the prosecutrix's employer to testify, over defense counsel objection, as to the prosecutrix's emotional state and attempted suicide after February 1, 1985. This evidence was irrelevant to the issue whether on February 1, 1985, defendant did sell, or attempt to sell, a child to the prosecutrix and should have been excluded. In addition, the evidence was such that it was extremely likely to prejudice defendant in the eyes of the jury by creating sympathy for the prosecutrix.

ARGUMENT

I

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT FINDING DEFENDANT GUILTY OF SALE OF A CHILD.

Defendant was charged and convicted of violation of §76-7-203, U.C.A. (1953, as amended 1973). (See Addendum 1.) The statute reads as follows:

> Sale of Child -- Any person, while having custody, care, control, or possession of any child, who sells, or disposes of, or attempts to sell or dispose of, any child for and in consideration of the payment of money or other thing of value is guilty of a felony of the third degree; provided, however, this section shall not make it unlawful for any person, agency, or

> corporation to pay the actual and reasonable maternity, connected medical or hospital and necessary living expenses of the mother preceding and during confinement as an act of charity, so long as payment is not made for the purpose of inducing the mother, parent, or legal guardian to place the child for adoption, consent to the adoption, or cooperate in the completion of the adoption.

It is thus illegal for a person to dispose of, or attempt to dispose of, a child "for and in consideration of the payment of money or other thing of value. . . ." It is not illegal, however, to pay medical and other expenses necessarily connected with the birth and adoption, so long as such payment is not inducement for the adoption.

Although the statute was enacted in 1973, defendant, after diligent research, has been unable to find any Utah Supreme Court decisions interpreting the statute and the elements necessary for a conviction. The issue of whether, under the facts brought out at trial, an offense in contravention of this statute actually occurred is therefore novel. An interpretation of the elements necessary to convict a person under §76-7-203 is of course integral to defendant's conviction in this case.

As pointed out in a recent case, where a defendant alleges that the evidence was insufficient to sustain his conviction--

> [T]he standard of review is narrow. "[W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or

> inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Petree, Utah, 659 P.2d 443, 444 (1983); accord, State v. McCardell, Utah, 652 P.2d 942, 945 (1982). In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses . . . ." State v. Lamm, Utah, 606 P.2d 229,231 (1980); accord, State v. Linden, Utah, 657 P.2d 1364, 1366 (1983). So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops. Cf., State v. Petree, 659 P.2d at 447 (no evidence that the defendant "intentionally or knowingly" caused the death of the victim in prosecution for second degree murder).

State v. Booker, 709 P.2d 342, 345 (Utah, 1985)

This analysis presupposes that the defendant is represented by competent defense counsel who has taken every reasonable measure during the course of the trial to protect the defendant's interests. In this case, the jury was instructed that the elements necessary for defendant's conviction under §76-7-203 were:

> 1. That on or about the 1st day of February, 1985, in Salt Lake County, State of Utah, the defendant, Julie Warren Verde, had custody, care, control and possession of any child; and
>
> 2. That the defendant:
>
> a. sold or disposed of, or
> b. attempted to sell or dispose of said child; and
>
> 3. That the defendant did so:

a. for and in consideration of the payment of money, or
b. for other thing of value; and

4. That the defendant committed such act intentionally or knowingly.

Plaintiff's Requested Jury Instruction No. 1 (R. 31), Instructions to the Jury No. 12 (R. 49). (See Addendum 7.) The jury was never instructed as to the exception contained in the second half of the statute and the exception for legal fees. As discussed in Argument II, infra, failure to instruct as to all the elements of §76-7-203, including the exceptions, was plain error. It no doubt confused the jury as to what sums of money discussed during the trial would violate the statute. This confusion can be inferred from the fact it took the jury over 8-1/2 hours to reach a verdict in this case. (Tr. 285, 289)

Even if the complaining witness's testimony is believed in toto, there is no crime under §76-7-203 proved by the evidence. Mrs. Watson testified that at most defendant received $95.00 from her--$80 to $90 in shots and $5.00 for gas money. (Tr. 62, 53-54) Mrs. Watson never testified that she paid for defendant's injections or gave her money for gas as consideration for receipt of a child, nor did she say that the defendant demanded the money and that she would not have been able to adopt a child through defendant but for the payment of these sums. It hardly seems likely that a person actually intending to sell a child would do so for $85 to $95.

This seems particularly incredible since the child in question belonged to defendant's best friend and the child's mother knew that the defendant had taken her on February 1, the day the offense allegedly occurred. (Tr. 185-186, 265)

Even the complaining witness testified that the larger sums discussed were always in the context of attorney's fees and medical expenses. (Tr. 15) No funds ever exchanged hands specifically for the purchase of a child, nor for any other expenses having to do with an adoption procedure. (Tr. 102) Defendant never did ask prosecutrix to pay her money for any adoption services (Tr. 104), not even on February 1, 1985, the day she allegedly committed this crime by bringing Emlee to the complaining witness and placing her in Mrs. Watson's car. (Tr. 61) In addition, the complaining witness testified that defendant told her that the large sums discussed ($2,000-$5,000) would be paid to the lawyer handling the adoption. (Tr. 10)

The evidence is therefore such that, even when viewed in the light most favorable to the verdict, fairminded persons must have entertained a reasonable doubt as to defendant's guilt. State v. Mills, 530 P.2d 1272, 1273 (Utah, 1975); State v. Gorlick, 605 P.2d 761, 762 (Utah, 1979). Defendant believes that when the testimony presented at trial is examined under this test, it is clear that she should not have been convicted of the crime of sale of a child and would not have been but for the Court's failure to properly instruct the jury as to the prohibited and permitted elements of §76-7-203, defense

counsel's ineffective representation at trial and the admission into evidence of the prosecutrix's suicide attempt. Conviction under this statute requires proof that a person sold or disposed of, or attempted to do so, a child "in consideration for the payment of money or other thing of value" and that such payment did not fall under the statutory exceptions. This the prosecution has failed to do in the case under review and defendant's conviction should be reversed.

II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO INSTRUCT THE JURY ON ALL ELEMENTS OF THE CRIME OF SALE OF A CHILD.

Section 76-7-203, U.C.A. (1953, as amended 1973), sets out all the elements necessary to prove the crime of sale of a child. (See Addendum 1.) The statute also sets out an exception if the payment of money or other thing of value is for "actual and reasonable maternity, connected medical or hospital and necessary living expenses of the mother" not intended as inducement to place the child for adoption. In addition, of course, payment of legal fees necessary to complete the adoption is permissible. (§55-8a-1(4), U.C.A. (1953, as amended 1984); see Addendum 5)

The jury instructions submitted by the prosecutor (R. 31, 38) and delivered to the jury verbatim by the Court (R. 49, 50; Addendum 4) mention only the criminal elements necessary to convict and do not include the exception elements of either §76-7-203 or §55-8a-1(4).

Defense counsel did not object to any of the jury instructions (Tr. 285), and the record does not reflect that defense counsel submitted any proposed instructions of his own. However, "[n]otwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice." §77-35-19(c), U.C.A. (1953, as amended 1980). (See Addendum 6.)

In conformity with this rule, the Utah Supreme Court has held--

> This Court will notice the failure to give an instruction even though it was not requested when the failure to do so would plainly result in a miscarriage of justice.

State v. Day, 572 P.2d 703, 705 (Utah, 1977). See also, State v. Pierren, 583 P.2d 69, 71 (Utah, 1978); State v. Lesley, 672 P.2d 79, 81 (Utah, 1983).

The question thus arises as to what constitutes a "manifest injustice" or "miscarriage of justice." The highest courts of several states, including the Supreme Court of Utah, have examined this issue. "The general rule is: An accurate instruction upon the basic elements of the offense charged is essential, and the failure to so instruct constitutes reversible error." State v. Laine, 618 P.2d 33, 35 (Utah, 1980) (fn. omitted) (emphasis added); accord, State v. Jones, 657 P.2d 1263, 1267 (Utah, 1982); State v. Reedy, 681 P.2d 1251, 1252 (Utah, 1984).

A recent Colorado case held that ". . .a trial court is under an obligation to instruct the jury properly, . . ., and a failure to do so as to every element of a crime charged is plain error." The Court therefore held that defendant's failure to object to the improper instruction would not bar review of the alleged error. Defendant's conviction was reversed because the jury was not clearly informed that a culpable mental state is an element of second degree kidnapping. Chambers v. People, 682 P.2d 1173, 1176-1177 (Colo., 1984) (citations omitted) (emphasis added); accord, People v. Ford, 60 Cal.2d 772, 36 Cal.Rptr. 620, 388 P.2d 892, 906 (1964), cert. den., 377 U.S. 940, 84 S.Ct. 1342, 12 L.Ed.2d 303 (1964); State v. Doe, 100 N.M. 481, 672 P.2d 654, 656 (1983) (failure to instruct on an essential element of the crime is jurisdictional and may be raised for the first time on appeal).

Utah also follows this rule. "Notwithstanding the appellant's failure to object to the jury instruction on criminal trespass, we are required in this case to pass upon and determine his first point of error [regarding a jury instruction] to prevent manifest injustice." State v. Lesley, supra. Since the challenged instruction in Lesley misstated the law of criminal trespass, the Court reversed appellant's conviction on that charge. Id at 82.

In this case, the jury was never instructed that payment of legal fees and medical expenses was not a crime under the statute. They were never informed as to the elements of

the statutory exceptions to the criminal elements. As both defendant and the prosecutrix testified (Tr. 14-15, 220-221, 223), the sums discussed ($2,000 to $5,000 according to the prosecutrix (Tr. 15)) were always in the context of legal fees and medical expenses. Neither witness ever stated that defendant would be receiving part of these funds for her assistance in placing a child for adoption with the prosecutrix. (Tr. 71) It was thus essential that the jury be fully informed as to the statute's elements of the crime as well as its exceptions, particularly in light of the Court's instruction that "[y]ou are to be governed solely by the evidence introduced in this trial and the law as stated to you by me." Instruction to the Jury No. 5 (emphasis added). (R. 42; see Addendum 4.) The Court, of course, was merely restating §77-17-10(2), U.C.A. (1953, as amended 1980), which provides "(2) The jury may find a general verdict which includes questions of law as well as fact but they are bound to follow the law as stated by the court." Addendum 6 (emphasis added).

Because the jury is required to follow the law as stated by the Court, the trial court in this case had the affirmative duty to instruct the jury as to both the elements of the crime and the exceptions thereto. Its failure to do so was plain error resulting in a manifest injustice particularly since the facts brought out at trial are insufficient to support a conviction under §76-7-203 as discussed in Argument I, supra.

III

INEFFECTIVE ASSISTANCE OF COUNSEL DENIED DEFENDANT A FAIR TRIAL.

As a result of the ineffective assistance of her defense counsel, defendant was denied the right to counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Section 12 of the Utah Constitution. The Utah Supreme Court has recently held that, in order to challenge a conviction on the basis of ineffective assistance of counsel, "it is the defendant's burden to show: (1) that his counsel rendered a deficient performance in some demonstrable manner, and (2) that the outcome of the trial would probably have been different but for counsel's error. Codianna v. Morris, Utah, 660 P.2d 1101 (1983). See also, United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." State v. Geary, 707 P.2d 645, 646 (Utah, 1985).

An accused in a criminal case has "the right to have competent counsel who will take such actions and present whatever defenses and interpose whatever objections he can in honesty and good conscience justify in the interest of his client." State v. Gray, 601 P.2d 918, 920 (Utah, 1979) (fn. omitted).

Defense counsel committed several errors in his representation of defendant. Firstly, he failed to offer any proposed jury instructions explaining that payment of attorney's

fees and medical expenses in connection with an adoption is not illegal under the statute, nor did he object to the court's instructions to the jury which omitted the exception elements of §76-7-203 from the explanation of the elements necessary for conviction. As discussed in Arguments I and II, supra, this failure was extremely prejudicial to defendant's defense. At several points in the testimony, the witnesses stated that sums between $2,000.00 and $5,000.00 were the estimated costs for medical expenses, while the attorney's fee would be $500.00. (Tr. 15, 40-42) Without an instruction as to all elements of the offense, including the exceptions for payment of medical and legal fees, it is possible that the jury could have determined that the proposed payment of legal and medical expenses violated the statute.

Secondly, without objection by defense counsel, the prosecution questioned the complaining witness, Mrs. Watson, and her mother, Mrs. Jackson, in great detail about the purchases of various items needed for a new baby, including a crib, clothing, diapers, a car seat and toys. (Tr. 21-27, 30-32, 134-136) This pathetic recital of dashed hopes was completely irrelevant to the issue of whether the complaining witness was going to receive a child for adoption from the defendant in consideration for the payment of money or other thing of value to the defendant. In addition, he failed to object to the introduction into evidence of the actual items purchased for the anticipated child. (Tr. 203) Both types of evidence should

have been excluded under Rule 402, Utah Rules of Evidence. (See Addendum 7.) As well as irrelevant, the testimony of Mrs. Watson in particular was highly prejudicial. Defendant was denied a fair trial since the jury was allowed to observe a weeping, brokenhearted woman discuss, item by item, purchases made for a child she never received.

Thirdly, the jury heard testimony about the complaining witness's emotional state after she learned she would not be able to adopt a child with defendant's assistance. Tania Leonard, a friend of Mrs. Watson's, was permitted to testify, without objection, as to how emotionally distraught the prosecutrix was after she knew she would not be able to adopt Emlee. (Tr. 125-127) The complaining witness's emotional state was irrelevant to establish the crime charged and should have been excluded. In addition, it was highly prejudicial to defendant's case and even if found to be relevant, should have been excluded under Rule 403, Utah Rules of Evidence. (See Addendum 7.)

Fourthly, three prosecution witnesses were allowed to testiry as to hearsay inadmissible under Rule 802, Utah Rules of Evidence (see Addendum 7), without objection by defense counsel. Ronda Colvin, a co-employee of Mrs. Watson's, testified as to Mrs. Watson's explanation of her payment of Mrs. Verde's shots (Tr. 110), even though this was consistent with Mrs. Watson's own testimony. (Tr. 98-99). Tania Leonard testified that Mrs. Watson told her (1) that she was going to adopt a baby

through the defendant (Tr. 120); (2) that defendant had given Mrs. Watson a letter purporting to be from the expectant mother (Tr. 121); (3) that defendant had given Emlee to Mrs. Watson to adopt (Tr. 123); and (4) that the person with whom Mrs. Watson was having a telephone conversation was the defendant (Tr. 124). Ms. Leonard also testified that she called the children's shelter to see if they had a baby named Emlee in their care; that the shelter had no such child (Tr. 126-127); and that she had discovered that Julie Verde did not work for Social Services. (Tr. 127) Detective Pat Smith of the Salt Lake City Police testified that the Utah State Hospital had no record of caring for Emlee's mother under the name defendant had given her. (Tr. 182) All of the above statements are hearsay and inadmissible under any of the exceptions to the hearsay rule. Defense counsel's failure to object to their admission into evidence was prejudicial to defendant's right to a fair trial.

Defendant believes that she has satisfied both parts of the Geary test to show ineffective assistance of counsel rising to the constitutional level of denial of her right to counsel. She has, as discussed above, demonstrated four areas in which her trial counsel rendered a deficient performance in her defense at trial. The extreme prejudice resulting from defense counsel's failure to ensure that the jury was instructed as to the exception to the offense of sale of a child was discussed in Arguments I and II, supra. The testimony of various witnesses regarding irrelevant evidence of baby purchases

and of the complaining witness's emotional state after the crime was committed and regarding hearsay inadmissible under any of the exceptions to the hearsay rule was prejudicial in the extreme. In discussing an ineffective assistance of counsel claim, the United States Supreme Court recently held--

> when a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. . . . In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Strickland v. Washington, 466 U.S. 668, 695-696, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (emphasis added). Strickland is particularly appropriate in defendant's case since the evidence against her was weak and the errors of counsel thus had a greater affect on the verdict than they otherwise would. Under the standards of Strickland, Geary and Gray, defendant has shown she was denied her right to counsel guaranteed by the United States and Utah Constitutions.

IV

THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING TESTIMONY THAT WAS IRRELEVANT, PREJUDICIAL AND CONFUSING TO BE ADMITTED OVER DEFENSE COUNSEL OBJECTION.

The trial court erred in admitting into evidence, over defense counsel objection, the statement by the prosecutrix's employer that the prosecutrix was emotionally upset after February 1, 1985, the date of the alleged offense, and that the prosecutrix attempted to commit suicide at some time thereafter. (Tr. 165) The standard for review of a trial court ruling on evidentiary matters is abuse of discretion. State v. McLain, 706 P.2d 603, 604 (Utah, 1985).

Rule 401 of the Utah Rules of Evidence defines "relevant evidence" as--

> evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

(See Addendum 7.) Rule 402 states that, unless otherwise provided, relevant evidence is admissible, while irrelevant evidence is not. (See Addendum 7.) Rule 403 provides that even relevant evidence may be excluded ". . .if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. . . ." (See Addendum 7.)

"The conduct of the person injured, subsequent to the offense, is irrelevant if not part of the res gestae. . . ." 22A C.J.S. Criminal Law §635, p. 489. "The term 'res gestae'

. . .may be defined. . .as the circumstances, facts and declarations which grow out of the main fact and serve to illustrate its character, and which are so spontaneous and contemporaneous with the main fact as to exclude the idea of deliberation or fabrication." 22A C.J.S. Criminal Law §662(1), pp. 660-661 (fns. omitted, emphasis added).

Under this analysis, whether the prosecutrix was emotionally distraught to the point of suicide after learning she would not be able to adopt a child with defendant's assistance is irrelevant to the issue as to whether, on February 1, 1985, defendant violated §76-7-203. Conviction under this statute requires proof that a person sold or disposed of, or attempted to do so, a child "in consideration for the payment of money or other thing of value" and that such payment did not fall under the statutory exceptions to this offense.

Here, there was no evidence as to when the suicide attempt occurred or any proof that the attempt was actually part of the res gestae. The evidence does not shed light on whether the defendant actually disposed of a child and was going to benefit personally from such placement. Dr. Barton's testimony should have been excluded under Rule 402 as irrelevant.

In addition, it was excludable under Rule 403 because of its prejudicial nature and the likelihood that the jury would confuse the issues to be determined by them. The issue was not whether the prosecutrix believed that she was going to adopt a child with defendant's assistance, but whether defendant

actually placed a child with the prosecutrix "in consideration of the payment of money or other thing of value."

The testimony should therefore have been excluded because it was not relevant to the proof of the offense alleged to have been committed and was prejudicial and likely to confuse the issues. The trial court thus abused its discretion by permitting Dr. Barton to testify as to the prosecutrix's emotional state and suicide attempt after the date of the alleged offense. Because of the potential for extreme prejudice likely from such a disclosure, defendant's conviction should be reversed.

CONCLUSION

The errors discussed above warrant reversal of defendant's conviction. Defendant therefore urges the Court to reverse her conviction for violation of §76-7-203 and remand the case back to the trial court. Defendant also asks the Court to rule on the admissibility of the prosecutrix's emotional state and suicide attempt even if the case is reversed on other grounds since this will provide guidance to the trial court when the case is retried.

Respectfully submitted this 15th day of April, 1986.

/s/
ROBERT VAN SCIVER
Attorney for Defendant-Appellant

/s/
MARGO L. JAMES
Of Counsel

ADDENDUM

1. Section 76-7-203, U.C.A. (1953, as amended 1973)

2. August 20, 1985, letter from Van O. Austin, M.D., Clinical and Forensic Psychiatry, and Robert J. Howell, Ph.D., Clinical and Forensic Psychology, Utah State Hospital, to Hon. Homer F. Wilkinson, Judge, Third District Court

3. Judgment, Sentence (Commitment), September 5, 1985

4. Instructions to the Jury

5. Section 55-8a-1(4), U.C.A. (1953, as amended 1984)

6. Section 77-17-10(2), U.C.A. (1953, as amended 1980)
   Section 77-35-19(c), U.C.A. (1953, as amended 1980)

7. Utah Rules of Evidence:
   - Rule 401
   - Rule 402
   - Rule 403
   - Rule 801
   - Rule 802

ADDENDUM 1

§76-7-203, U.C.A. (1953, as amended 1973)

76-7-203. Sale of child.—Any person, while having custody, care, control, or possession of any child, who sells, or disposes of, or attempts to sell or dispose of, any child for and in consideration of the payment of money or other thing of value is guilty of a felony of the third degree; provided, however, this section shall not make it unlawful for any person, agency, or corporation to pay the actual and reasonable maternity, connected medical or hospital and necessary living expenses of the mother preceding and during confinement as an act of charity, so long as payment is not made for the purpose of inducing the mother, parent, or legal guardian to place the child for adoption, consent to the adoption, or co-operate in the completion of the adoption.

ADDENDUM 2

1885 29 1985

UTAH STATE HOSPITAL

100 Years Of Service

August 20, 1985

The Honorable Homer F. Wilkinson
Judge of the Third District Court
240 East 400 South
Salt Lake City, Utah 84111

re: *VERDE, Julie*
Case Number: CR85-534

Dear Judge Wilkinson:

The following is a report on Julie W. Verde, whom you committed to this hospital on August 1, 1985 for a thirty-day evaluation. Her evaluation has consisted of multiple psychiatric interviews, psychological testing, physical examination, psychosocial interviews, observation of her functioning in the treatment setting, and presentation before the clinical staff. Although she has been pleasant during this evaluation, she has been less than honest.

We find that Julie Verde is not mentally ill. Her thought processes, mood, affect, and ability to perceive and interpret reality are each appropriate. There is no evidence of organic brain dysfunction. There are signs of reactive depression which is related to her current legal situation.

We do not feel that inpatient mental health treatment is indicated. She does have significant personality problems and if placed on probation she could benefit from counseling as part of her probation agreement.

We feel that she could be satisfactorily managed if placed on probation, and do not feel that she would benefit from incarceration.

Sincerely,

Van O. Austin, M.D.

Van O. Austin, M.D.
Clinical and Forensic Psychiatry

Robert J. Howell, Ph.D.

Robert J. Howell, Ph.D.
Clinical and Forensic Psychology

VOA:lc

Enclosures: Psychiatric evaluation
Social case history
Psychological assessment

cc: Ted Cannon, Esq. - Salt Lake County Attorney
Alan Frandsen, Esq. - Defense attorney
Joanne Jennings - Adult Probation and Parole
Byron Stark - Salt Lake County Clerk's Office

ADDENDUM 3

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

[illegible] V [illegible]
(C

Defendant.

JUDGMENT, SENTENCE
(COMMITMENT)

Case No. [illegible]
Count No. 2
Honorable HOMER F. WILKINSON
Clerk G.A. CHILDS
Reporter ALAN SMITH
Bailiff GROVER MEDLEY
Date [illegible]

☐ The motion of _____ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☑ a jury; ☐ the court; ☐ plea of guilty; ☐ plea of no contest; of the offense of [illegible], a felony of the [illegible] degree, ☐ a class _____ misdemeanor, being now present in court and ready for sentence and represented by [illegible], and the State being represented by [illegible], is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

☐ to a maximum mandatory term of _____ years and which may be for life;
☑ not to exceed five years;
☐ of not less than one year nor more than fifteen years;
☐ of not less than five years and which may be for life;
☐ not to exceed _____ years;
☑ and ordered to pay a fine in the amount of $ [illegible];
☐ and ordered to pay restitution in the amount of $_____ to _____

☐ such sentence is to run concurrently with _____
☐ such sentence is to run consecutively with _____
☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) _____ are hereby dismissed.
☐ _____
☑ Defendant is granted a stay of the above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of [illegible], pursuant to the attached conditions of probation.
☐ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☐ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.
☐ Commitment shall issue _____

DATED this [illegible] day of [illegible], 19 [illegible]

APPROVED AS TO FORM:

[illegible]
DISTRICT COURT JUDGE

_____
Defense Counsel

Judgment/State v. _____/CR _____/Honorable _____

CONDITIONS OF PROBATION

☒ Usual and ordinary conditions required by the Dept. of Adult Probation & Parole.
☒ Serve _____
in the Salt Lake County Jail commencing _____.
☐ Pay a fine in the amount of $_____ ☐ at a rate to be determined by the Department of Adult Probation and Parole; or ☐ at the rate of _____.
☒ Pay restitution in the amount of $ _____; or ☒ in an amount to be determined by the Department of Adult Probation and Parole; ☐ at a rate of _____ ; or ☐ at a rate to be determined by the Department of Adult Probation and Parole.
☐ Enter, participate in, and complete any _____ program, counseling, or treatment as directed by the Department of Adult Probation and Parole.
☐ Enter, participate in, and complete the _____ program at _____.
☐ Participate in and complete any ☐ educational; and/or ☐ vocational training ☐ as directed by the Department of Adult Probation and Parole; or ☐ with _____.
☐ Participate in and complete any _____ training ☐ as directed by the Department of Adult Probation and Parole; or ☐ with _____.
☐ Submit person, residence, and vehicle to search and seizure for the detection of drugs.
☐ Submit to drug testing.
☐ Not associate with anyone who illegally uses, sells, or otherwise distrubutes narcotics or drugs.
☐ Not frequent any place where drugs are used, sold, or otherwise distributed illegally.
☐ Not use or possess non-prescribed controlled substances.
☐ Refrain from the use of alcoholic beverages.
☐ Submit to testing for alcohol use.
☐ Take antabuse ☐ as directed by the Department of Adult Probation and Parole.
☐ Obtain and maintain full-time employment.
☐ Maintain full-time employment.
☐ Obtain and maintain full-time employment or full-time schooling.
☐ Maintain full-time employment or obtain and maintain full-time schooling.
☐ Defendant is to have no contact nor associate with _____.
☐ Defendant's probation may be transferred to _____ under the Interstate Compact as approved by the Department of Adult Probation and Parole.
☐ Complete _____ hours of community service restitution as directed by the Department of Adult Probation and Parole.
☒ Complete _____ hours of community service restitution in lieu of _____ days in jail.
☐ Defendant is to commit no crimes.
☐ Defendant is ordered to appear before this Court on _____ for a review of this sentence.
☐ _____.
☐ _____.
☐ _____.
☐ _____.
☐ _____.
☐ _____.

DATED this _____ day of _____, 19_____

_____
DISTRICT COURT JUDGE

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

JULIE WARREN VERDE,

Defendant,

INSTRUCTIONS TO THE JURY

CRIMINAL NO. CR 85-534

INSTRUCTION NO. 1

You are instructed that the defendant JULIE WARREN VERDE is charged by the Information which has been duly filed with the commission of SALE OF A CHILD. The Information alleges:

SALE OF A CHILD, a Third Degree Felony, in Salt Lake County, State of Utah, on or about February 1, 1985, in violation of Title 76, Chapter 7, Section 203, Utah Code Annotated, 1953 as amended, in that the defendant, Julie Warren Verde, a party to the offense, did have custody, care, and control or possession of a child, and did sell, dispose of, or attempt to sell or dispose of, a child for and in consideration of the payment of money or other thing of value.

INSTRUCTION NO. 5

It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you.

The function of the jury is to try the issues of fact that are presented by the allegations in the Information filed in this court and the defendant's plea of "not guilty". This duty you should perform uninfluenced by pity for the defendant or by passio or prejudice against him. You must not suffer yourselves to be biased against the defendant because of the fact that he has been arrested for this offense, or because an Information has been fi against him, or because he has been brought before the court to stand trial. None of these facts is evidence of his guilt, and yo are not permitted to infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion prejudice, public opinion or public feeling. Both the State of Utah and the defendant have a right to demand and they do demand and expect that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, that you wil reach a just verdict regardless of what the consequences of such verdict may be. The verdict must express the individual opinion of each juror.

INSTRUCTION NO. 12

Before you can convict the defendant, Julie Warren Verde, of the crime of Sale of a Child, a Felony of the Third Degree as charged in the Information, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime:

1. That on or about the 1st day of February, 1985, in Salt Lake County, State of Utah, the defendant, Julie Warren Verde. had custody, care, control or possession of any child; and

2. That the defendant:

a. sold or disposed of, or

b. attempted to sell or dispose of said child; and

3. That the defendant did so:

a. for and in consideration of the payment of money, or

for other thing of value; and

4. That the defendant committed such act intentionally or knowingly.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if the evidence has failed to so establish one or more of said elements then you should find the defendant not guilty.

Note: This is identical to plaintiff's requested instruction #1, R. 31

R. 49

INSTRUCTION NO. 13

Under the laws of the State of Utah, a person commits the crime of Sale of a Child when the actor has custody, care, control or possession of any child, and the actor sells or disposes of, or attempts to sell or dispose of said child, and the actor does so for and in consideration of the payment of money or other thing of value.

Note: This is identical to plaintiff's requested instruction #8, R. 38

R. 50

ADDENDUM 5

§55-8a-1, U.C.A. (1953, as amended 1984)

55-8a-1. "Child placing" defined — License requirement — Limitations on unlicensed individuals — Enforcement actions — Civil penalty for violation — Collection and disposition. (1) For purposes of this chapter, child placing is the receiving, acceptance, or providing custody or care for any child under 18 years, temporarily or permanently, for the purpose of finding a person to adopt the child or placing the child temporarily or permanently in a home for adoption or foster home placement.

(2) No person, agency, firm, corporation or association, or group children homes may engage in child placing, or solicit money or other assistance for child placing, without having a valid written license from the Division of Family Services.

(3) An attorney, physician, or other person may assist a parent in identifying or locating a person interested in the adoption of a child of the parent, or assist a person in identifying or locating a child to be adopted; provided that no payment, charge, fee, reimbursement of expense, or exchange of value of any kind, or promise or agreement to make the same, may be made for any assistance. No attorney, physician, or any other person may issue or cause to be issued any card, sign, or device to any person, or cause, permit, or allow any sign or marking on or in any building or structure, or announce or cause, permit, or allow any announcement to appear, in any newspaper, magazine, directory, or on radio or television, or advertise by any other means that the attorney, physician, or other person is available to provide assistance.

(4) No provision of this chapter precludes payment of fees for medical, legal, or other lawful services rendered in connection with the care of a mother, delivery and care of a child, or lawful adoption proceedings; nor may any provision of this chapter abrogate the right of procedures for independent adoption as provided by law.

(5) The Division of Family Services or any interested person may commence an action in the district court to enjoin any person, agency, firm, corporation, or association violating Subsections (2) or (3).

(6) A county attorney or the state attorney general shall institute legal action as necessary to enforce the provisions of this section, when informed of any alleged violation. If the county attorney does not take action within 30 days after being informed, the attorney general may be requested to take action, and shall then institute legal proceedings in place of the county attorney.

(7) In addition to the remedies provided in Subsections (5) and (6), any person, agency, firm, corporation, or association violating Subsection (2) or (3) shall forfeit all proceeds identified as resulting from the transaction, and may also be assessed a civil penalty of not more than $10,000 for each violation. Every act in violation of Subsection (2) or (3), including every placement or attempted placement of a child, is a separate violation.

(8) (a) All amounts recovered as penalties under Subsections (7) and (8) shall be placed in the general fund of the prosecuting county, or in the state General Fund if the state attorney general prosecutes.

(b) If two or more governmental entities are involved in the prosecution, the penalty amounts recovered shall be apportioned by the court among the entities according to their involvement.

(9) A judgment ordering the payment of any penalty or forfeiture under Subsections (7) or (8) constitutes a lien when recorded in the judgment docket and has the same effect and is subject to the same rules as a judgment for money in a civil action.

ADDENDUM 6

§77-17-10, U.C.A. (1953, as amended 1980)

77-17-10. Court to determine law; the jury, the facts. (1) In a jury trial, questions of law are to be determined by the court, questions of fact by the jury.

(2) The jury may find a general verdict which includes questions of law as well as fact but they are bound to follow the law as stated by the court.

§77-35-19, U.C.A. (1953, as amended 1980)

77-35-19. Rule 19 — Instructions. (a) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally, or otherwise waive this requirement.

(b) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it. If part be given and part refused, the court shall distinguish, showing by the endorsement what part of the charge was given and what part was refused.

(c) No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury is instructed, stating distinctly the matter to which he objects and the ground of his objection. Notwithstanding a party's failure to object, error may be assigned to instructions in order to avoid a manifest injustice.

(d) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(e) Arguments of the respective parties shall be made after the court has instructed the jury. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court.

ADDENDUM 7

Utah Rules of Evidence

RULE 401
DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402
RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the State of Utah, statute, or by these rules, or by other rules applicable in courts of this State. Evidence which is not relevant is not admissible.

RULE 403
EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 801
DEFINITIONS

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements which are not hearsay.** A statement is not hearsay if

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with his testimony or the witness denies having made the statement or has forgotten, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

RULE 802
HEARSAY RULE

Hearsay is not admissible except as provided by law or by these rules.

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing Brief of Respondent were hand delivered to David B. Thompson, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, on this 15th day of April, 1986.

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